No. 20-1046

IN THE

# Supreme Court of the United States

MARIN HOUSING AUTHORITY,

*Petitioner*,

*v.*

KERRIE REILLY,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

## BRIEF OF THE CALIFORNIA ASSOCIATION OF HOUSING AUTHORITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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## QUESTION PRESENTED

Whether a public housing authority must include, in calculating a Section 8 participant's annual income for eligibility purposes, "amounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home," where the Section 8 participant provides the services herself, no out-of-pocket costs have actually been incurred, and thus there is no cost of services and equipment to offset.

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## INTEREST OF *AMICUS CURIAE*[1]

The California Association of Housing Authorities (CAHA) is a statewide association representing over one hundred housing authorities throughout the state of California. Its purpose is to meet the needs of the 395,000 households it serves by advocating on behalf of public housing residents, participants in affordable housing programs, and local housing agencies in both California and Washington D.C. CAHA is actively involved in all aspects of affordable housing: finance, rental management issues, and housing and land use law, and closely follows the programs and policies of state housing agencies and the United States Department of Housing and Urban Development ["HUD"]. CAHA also addresses the training needs of its members by providing timely seminars on a variety of topics regarding the Housing Choice Voucher ["Section 8"] program and the administration of Public Housing.

CAHA's member agencies have an interest in this case because they have legal and budgetary responsibility for administering the Section 8 housing voucher program at the local level. To that end, it is critical that local housing authorities be given clear guidance as to how that program is to be administered in a consistent and predictable way, and that the federal dollars appropriated to that program be allocated among deserving, eligible families in the most equitable way possible.

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[1] All parties were timely notified and consented to the filing of this *amicus curiae* brief. No party's counsel authored this brief in any part, and *amicus curiae* alone funded its preparation and submission. Rule 37.

In light of the California Supreme Court's recent decision in the present matter, public housing authorities in California and elsewhere are confronted with the dilemma of following either California state court precedent or contrary precedent out of the Fifth Circuit Court of Appeals and the Minnesota Supreme Court. Compounding matters, HUD's guidance on this regulation, which is routinely followed by public housing authorities tasked with administering the Section 8 program, is consistent with the Petitioner's position here, but contrary to the position announced by the California Supreme Court. In addition, the decision below is counterproductive to the mission of the Section 8 program to provide decent, safe housing to low-income families, as it will require an unwarranted diversion of limited federal funding from otherwise-deserving and eligible families to the Respondent and other similarly-situated families in a preferential way that is inconsistent with the intent of the regulation. This *amicus* therefore urges this Court to grant *certiorari* and reverse the decision below.

## SUMMARY OF ARGUMENT

1. The inescapable effect of the decision of the California Supreme Court is that whatever additional subsidy is to be provided to the Respondent will reduce the amount of Section 8 funding that is available to other deserving and eligible families. The construction of the regulation urged by the Petitioner, and by this *amicus*, is not, as suggested by the California Supreme Court, a "crabbed interpretation" that threatens the Respondent family's ability to provide home care services to a developmentally

disabled family member. It is, instead, a balanced and even-handed application of the regulation, which must be read and understood in the limited funding environment in which the Section 8 program exists and is administered. The regulation is intended to treat Section 8 families who use IHSS funding to pay for outside service providers, and those who choose to provide the care themselves, evenhandedly with regard to the calculation of family income available to pay rent, and the effect that calculation has on the amount of their federal housing subsidy. By contrast, the California Supreme Court's opinion extends unintended preferential treatment to families who choose to provide care themselves, artificially discounts the amount of their income for eligibility purposes as a result, and has the unavoidable effect of diminishing the funding available to other eligible participants.

2. The regulation in question states that "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to ***offset the cost of services and equipment*** needed to keep the developmentally disabled family member at home," shall not be included in the calculation of the participant's annual income for Section 8 eligibility purposes. 24 CFR 5.609(c)(16). The language is clear and unambiguous on its face, and presumes that financial costs were actually incurred by the participant family, and that the amounts paid by the state to the family – here, amounts paid through the State of California IHSS program – were used to offset those costs. For the California Supreme Court to read into that plain language the notion that "costs" might also mean

"emotional costs" or "opportunity costs" is to violate one of the foundational precepts of statutory (and regulatory) construction; *i.e.,* that the words of a statute are to be read and applied in accordance with their ordinary, plainly understood meaning. By no straightforward, intellectually honest reading of section 5.609(c)(16), can the phrase "offset the cost of services" be understood to mean what the California Supreme Court has construed it to mean.

## ARGUMENT

### I. The Decision of the California Supreme Court Poses a Direct and Immediate Threat to Public Housing Authorities' Ability to Utilize Limited Financial Resources to Serve the Largest Possible Population of Eligible Participants in the Section 8 Program.

As noted with exceptional clarity by the three dissenting judges on the California Supreme Court:

> [T]he majority's interpretation [of section 5.609(c)(16)] will reduce, by an unknown but potentially sizable amount, the number of families that can obtain Section 8 housing assistance in California. The majority's decision will not increase by a single dollar the Section 8 funds reaching California. Yet it will require the state's counties to steer a significantly larger portion of their Section 8 housing funds to families that receive IHSS compensation for caring for a disabled member in the

> home. These increased subsidies can come from only one place: The funds available to other low-income families who are, or would have been, receiving housing assistance under Section 8. The majority's expansive interpretation will come at the cost of assistance to other families in need.

*Reilly v. Marin Housing Authority*, 10 Cal. 5th 583, 618, 472 P.3d 472, 497 (2020)(Cantil-Sakauye, C. J., dissenting).

This is not hyperbole; it is the hard, data-driven reality of the limited and finite funding of the Section 8 program. Nor is it limited to the State of California; this is a nation-wide phenomenon. However well-intentioned the four judges in the majority may have been, the irreducible fact is that the increase in the Respondent's housing subsidy will come at the expense of other deserving and eligible families. As multiplied by the thousands of families who receive IHSS or similar state funding in other states, the impact on the program and its other eligible participants cannot be overstated.[2]

Unlike Medicaid or the Supplemental Nutrition Assistance Program or numerous other federal low-income programs, the Section 8 housing

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[2] If, as appears to be the case here, Section 8 participants who have had IHSS or similar payments included in their annual income calculations, now seek retroactive reimbursements of the amounts by which their rent has been under-subsidized, the impact on the program could be truly daunting. *See* Petitioner's Cert. Petition at p. 26, n.6.

choice voucher program is not an entitlement program. It does not, and cannot, serve everyone who is eligible for housing assistance for the simple reason that the program's funding is finite and does not automatically expand to meet increased need.[3] In fact, for years, the federal monies that are made available for Section 8 housing vouchers have been sufficient to fund only 90% of the vouchers that are authorized by HUD every year, resulting in over 250,000 vouchers that go unfunded and unused nationally every year.[4] The Marin Housing Authority's experience is illustrative, but not unique. It is authorized by HUD to issue 2,153 vouchers, but the federal funding it receives allows it to fund only 1,957 of them. *Reilly, supra*, 10 Cal. 5th at 621, 472 P.3d at 499 (Cantil-Sakauye, C. J., dissenting). By way of further illustration, data from 2017 demonstrates that thousands of HUD-authorized Section 8 vouchers cannot be used in America's three largest cities because there is insufficient money appropriated in the program to fund them all: Chicago (4,075 unfunded and unused vouchers), Los Angeles (4,404 unfunded vouchers), New York (15,137 unfunded vouchers). In the State of California alone, a total of 29,584 HUD-authorized vouchers went

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[3] D. Rice, S. Schmit, and H. Matthews, Center on Budget and Policy Priorities, *Child Care and Housing: Big Expenses With Too Little Help Available*, https://www.cbpp.org/research/housing/child-care-and-housing-big-expenses-with-too-little-help-available (2019).

[4] Center on Budget and Policy Priorities, *Housing Choice Voucher Utilization Data 2004-2017,* https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data#table1 (2019).

unused for lack of funding.[5] As the data shows, this is very much a zero-sum game: every dollar of additional subsidy that is allocated to one family is a dollar less that is available for another deserving, income-eligible family.

More pointedly, 77% of low-income individuals and families who would otherwise be income-eligible for rental assistance do not receive it because of funding limitations.[6] The wait lists even to apply for the Section 8 program are extraordinarily long. A national study done in 2016 by the National Low Income Housing Coalition showed that the average number of households on waitlists for Section 8 vouchers in housing authorities the size of Petitioner Marin Housing Authority was 3,476, and the average wait time for same size housing authorities was 60 months – five years.[7] For large housing authorities (more than 5,000 units of housing), the average number of households on their wait lists was 12,736, and the average wait time was 84 months – seven years. Over half the wait lists were simply closed.[8]

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[5] *Id.*

[6] Center on Budget and Policy Priorities, *Three Out of Four Low-Income At-Risk Renters Do Not Receive Federal Rental Assistance* (sourced from HUD's 2015 American Housing Survey and other data sources), https://www.cbpp.org/three-out-of-four-low-income-at-risk-renters-do-not-receive-federal-rental-assistance (2017).

[7] National Low Income Housing Coalition, *The Long Wait for a Home*, https://nlihc.org/sites/default/files/Housing Spotlight_6-1_int.pdf (2016).

[8] *Id.*

What is equal parts puzzling and indefensible about the underlying decision is its insistence that excluding IHSS payments from a family's annual income – as opposed to what it called the "crabbed interpretation" that it should not be - is necessary to effectuate the goals of making affordable housing available to families with developmentally disabled members. *See Reilly, supra,* 10 Cal. 5th at 603, 472 P.3d at 486.

In fact, the Petitioner's position, and that of this *amicus*, is that the regulation in question, if properly read not to exclude the Respondent's IHSS payments, ensures that those who choose to use such funding to pay for outside service providers, and those who choose to provide those services themselves, are treated fairly and evenhandedly. No one is "punished."[9] To the extent that a family chooses to pay for third-party service providers, and then elects to make use of the employment "opportunity" gained as a result to obtain work outside the home, the IHSS payments are excluded from income, and the family's outside earnings are properly (and fairly) included. If, instead, the family receives IHSS payments, but elects to provide care themselves, the IHSS payments are considered to be income to the family, as they are not offsetting any cost for services and equipment; there are no such costs to be offset. In either case, the effect of the family's receipt of IHSS payments on its ***housing*** needs and on the size of its Section 8 housing voucher is indistinguishable, as it should be. In each case, money that is available to pay rent is ***included***

[9] *Combined Income & Rent,* 60 Fed. Reg. 17,388-89 (April 5, 1995).

in the calculation of annual income, and money that is required to offset other costs is ***excluded.***

The Petitioner and this *amicus* understand that the ultimate funding fix for America's affordable housing problem lies not with this Court, but with Congress. But similarly, it is not for the courts to confer preferential benefits to certain families, where, in order to do so, it must of necessity reduce or eliminate a corresponding benefit to an equally deserving and eligible family. To expand the income exclusion rules, as the California Supreme Court has done in the present case, only exacerbates the existing problem, in a way that is not authorized by the plain language of the regulatory framework and is counterproductive to the central purpose of the statute.

## II. The Plain Language of the Regulation Dictates That the Respondent's IHSS Payments Should be Included in the Calculation of Her Annual Income

The Section 8 housing choice voucher program is an income-based housing assistance program. 42 U.S.C. § 1437f; *In re Ali,* 938 N.W.2d 835, 837-38 (Minn. 2020); *see generally, DeCambre v, Brookline Housing Authority,* 826 F.3d 1, 4, 9 (1st Cir. 2016). The amount of the housing subsidy that a participant receives is largely a function of her "annual income," which is defined broadly as "all amounts, monetary or not, which . . . [g]o to, or on behalf of, the family head or spouse . . . or to any other family member . . . [w]hich are not specifically excluded in paragraph (c) of this section." 24 C.F.R. § 5.609(a)(1), (3). The

income eligibility criteria of the program are intended to focus in a fair and pragmatic way on the funds that are available to a family to pay for rent and other essential costs of living. *See Reilly, supra*, 10 Cal. 5th at 615-16, 472 P.3d at 495 (Cantil-Sakauye, C. J., dissenting). The regulations that define those amounts of money that "go to" a family, but are nonetheless excluded from the definition of "annual income," need to be understood with that essential focus in mind.

In this case, the exclusion in question reads:

> Annual income does not include . . .
>
> . . .
>
> (16) Amounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home.

24 C.F.R. § 5.609(c)(16).

The plain and inescapable logic of the exclusion is that monies received from the state to offset costs that are incurred for services and equipment needed to keep a disabled family member at home are not, by definition, available to the family for rent and other daily cost-of-living essentials. It would therefore be unfair, and inconsistent with the essential mission of the Section 8 program, to include those amounts in the calculation of a participant's annual income. Were her income to be inflated by including those

funds, with no corresponding increase in the funds actually available to her to pay rent, she would experience a reduction - sometimes a substantial reduction - in the amount of her rental subsidy. The fundamental economic assumption underlying exclusion (c)(16) is that a Section 8 participant who has received certain funds from the state (which would otherwise be considered "income" to her), but has used those funds specifically to offset costs for services and equipment that she incurred in order to make it possible to keep a disabled family member at home, should not be "penalized" by having her housing subsidy reduced because of an illusory increase in her annual income. *Reilly, supra,* 10 Cal. 5th at 594, 472 P.3d at 480.

Those economic realities simply do not apply where the Section 8 participant does not use the funds from the state to pay for an outside person or agency to come into the home to provide the needed services, but elects (quite lawfully) to keep the money and provide the needed services herself, incurring no financial costs in the process. In that case, the funds received from the state are simply "income" to the family, and are available to be used, in an unrestricted way, by the participant family for anything, including rent and daily essentials. Since the participant has incurred no actual costs for services and equipment, there is nothing to "offset."

That is precisely the situation involving the Respondent in the present case. She has a developmentally disabled daughter who lives at home and requires 24/7 care and supervision. As such, she was entitled to receive compensation from the State

of California Department of Social Services, through the In-Home Supportive Services ["IHSS"] program. Those funds could be used either (1) by the Department itself to pay an outside caregiver to come into the home and provide the needed services, or (2) by the Respondent to pay for an outside service provider, or (3) as compensation directly to the Respondent who provides the in-home care herself. *Reilly, supra,* 10 Cal. 5th at 588-89, 472 P.3d at 476. The Respondent chose the third option, which is available only "when the [parent] leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available." *Id.,* 10 Cal. 5th at 608, 472 P.3d at 489 (citing Cal. Welf. & Inst. Code, § 12300, subd. (e))(Cantil-Sakauye, C. J., dissenting). Thus, in a very real sense, the State of California has essentially hired (and paid) the Respondent to perform in-home supportive services, that an outside agency or person otherwise might have been paid to perform.[10] The Respondent incurred no "costs" in electing to proceed in this fashion – although she would have had she elected the second option set forth above. Moreover, had the Respondent chosen to use her IHSS benefits to offset the financial cost of retaining an outside service provider for her daughter (thus excluding those benefits from her "annual income" calculation), and then obtained employment outside the home, the money she earned would clearly be included in her "annual income" calculation under the Section 8 regulations. The distinction is between those

[10] According to the record, the Respondent's annual income thus consisted of $41,000 in IHSS payments, and $11,000 in Social Security benefits. *See* Petitioner's Cert. Petition at p. 10.

incoming funds that become available to the participant for rent and those that do not.

The California Supreme Court, in justifying its decision, was required to create the fiction that "cost," as used in a regulation about the calculation of annual income, can mean such non-monetary notions as "emotional costs" and "opportunity costs." Having thus softened the definition of "cost," it was a small step further to conclude that "offset" was broad enough to encompass direct compensation for the emotional cost of caring for a disabled daughter or the lost opportunity cost of foregoing outside employment. *Reilly, supra,* 10 Cal. 5th at 590-91, 472 P.3d at 477-78. This is stretching language beyond the breaking point.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).[11] It is also fundamental that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989). Finally, a statute or regulation must be interpreted in a manner that effectuates its central purpose. *Ali v. Federal Bureau of Prisons,* 552 U.S. 214, 229-30

[11] Canons of construction are applicable equally to both statutes and administrative regulations. *See, e.g., National Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 668-69 (2007); *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170 (2007).

(2008). The California Supreme Court's opinion violates all three of these fundamental canons.

First, it cannot be open to debate that the primary, commonly understood meaning of the word "cost" is anything other than the amount paid for something; *i.e.,* its price. Yes, the word and its derivatives can sometimes have other, secondary meanings in certain contexts: a "costly" mistake; to win at all "costs"; the scandal "cost" him the election. But *plainly*, what the word means in the regulation at issue here is the financial price attached to something (specifically, "services and equipment"), as reflected in an out-of-pocket expense of money. *Anthony v. Poteet Housing Authority,* 306 Fed. App'x 98, 101-02 (5th Cir. 2009); *In re Ali, supra,* 938 N.W.2d at 839; *Reilly v. Marin Housing Authority,* 23 Cal. App. 5th 425, 435, 232 Cal Rptr. 3d 789, 796 (2018). Moreover, when IHSS funds are paid directly to the Respondent for the care of her daughter, those payments are not being made to "offset the cost of services"; they are compensation ***for*** those services. Had the regulation been drafted to read "compensation for services," rather than "offset the cost of services" - which are not synonymous phrases - this might be a different case. But that is not what the plain language of the regulation says. The "plain meaning" rule is not an invitation to the court to interpret the words of a regulation by means of secondary and tertiary definitions found in a dictionary; it is an instruction to apply the ordinary, common understanding of the word – which is what every court has done that has addressed this issue, with the sole exception of a 4-3 majority of the California Supreme Court.

Second, the California Supreme Court's interpretation of the regulation renders certain words essentially meaningless. The regulation refers to "the cost of services and equipment." Even if the word "cost," as applied to "services," were given the alternative meaning ascribed to it by the California Supreme Court, that meaning would make absolutely no sense when applied to "equipment." "Equipment" is a term ordinarily and plainly understood to refer to physical things - machinery, hardware - and it is impossible to understand what the "emotional cost" or the "opportunity cost" of a piece of equipment might be. It is yet another cardinal rule of construction that significance and effect shall, if possible, be accorded to every word of the text. *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879). The California Supreme Court's opinion violates that rule of construction.

Third, the decision below is devoid of context. The regulation in question is an exclusion found in a lengthy set of subparts of a section dealing exclusively with the subject of defining, quantifying, and calculating a Section 8 participant's annual income, which is one of the critical factors in determining mathematically the dollar value of the participant's subsidy. Generally speaking, a Section 8 voucher holder must pay 30% of her adjusted monthly income, or 10% of her gross monthly income, whichever is greater, for her monthly rent, with the federal subsidy paying the balance to the landlord. *Reilly, supra,* 10 Cal. 5th at 589, 472 P.3d at 477; 42 U.S.C. § 1437f(o)(2)(A). It would be incongruous if HUD had intended the phrase "offset the cost of services and equipment," as the key language in a subsection having specifically to do with an income exclusion, to

mean something as inherently amorphous and non-quantifiable as the "emotional cost" of such services.

Finally, it is important to keep the "central purpose" of this statutory and regulatory scheme in mind. Section 8 is a low-***income*** based ***housing*** program. The overriding purpose of the statute and the accompanying regulations is to subsidize housing expenses for low-income people who do not have access to sufficient available sources of income to keep a safe and decent roof over their head. It is not an all-purpose transfer payments program for low-income families. But here, the inescapable truth is that under this decision, the Respondent will be contributing 10% of her gross income of $11,000 (or 30% of her adjusted income) for rent, when the amount of unrestricted income she is actually receiving, from Social Security and IHSS, is over four times that amount. No one is suggesting that she is ineligible to participate in either the Section 8 program or the IHSS program. But at some point, the intended central purpose of the program as a low-income housing assistance program has been effectively erased.

Public housing administrators are saddled with the often difficult task of applying statutory and regulatory language to an almost infinite variety of circumstances. Among the most important of those circumstances are the criteria for determining who is eligible to participate in the federal government's many public housing programs, including the Section 8 voucher program that is the subject of the present case. It is critically important to that undertaking that our courts construe and apply the language of the

relevant statutes and regulations in accordance with their plainly understood meaning, and that the guidance provided to our public housing authorities be plainly understood. The California Supreme Court has actually made those tasks immeasurably more difficult, and the plain understanding of regulatory language more inscrutable. The decision of the court in *Reilly v. Marin Housing Authority* should be reversed.

## CONCLUSION

For the reasons set forth herein, this *amicus* respectfully urges this Court to grant the Petitioner's Petition for a Writ of *Certiorari* to the Supreme Court of California.

Respectfully submitted,

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